

***United States Court of Appeals  
for the Second Circuit***



**PETITION FOR  
REHEARING  
EN BANC**



# 75-1376

To be argued by  
IRVING ANOLIK

In The

**United States Court of Appeals**

For The Second Circuit

UNITED STATES OF AMERICA,

*Appellant,*

vs.

DOMINIC TORTORELLO,

*Defendant-Appellee.*

*On Appeal from the United States District Court for the  
Southern District of New York*

**PETITION for REHEARING and PETITION for REHEARING  
en banc, by DOMINIC TORTORELLO, and MOTION in the  
ALTERNATIVE for a STAY of MANDATE PENDING CERTIORARI**

JOSEPH P. CARROZZA

*Attorney for Appellee*

225 Broadway

New York, New York 10007

(212) 732-3050

IRVING ANOLIK  
*Of Counsel*

(9156)

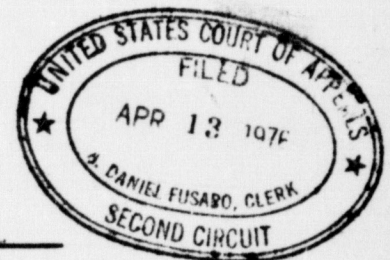
LUTZ APPELLATE PRINTERS, INC.  
Law and Financial Printing

South River, N.J.  
(201) 257-6850

New York, N.Y.  
(212) 563-2121

Philadelphia, Pa.  
(215) 563-5587

Washington, D.C.  
(202) 783-7288



B  
P/S

## TABLE OF CONTENTS

	Page
Reasons for Granting the Petition . . . . .	2
Motion in the Alternative for a Stay of Man- date pending Certiorari . . . . .	7
Certification . . . . .	8

## TABLE OF CITATIONS

### Cases Cited:

Amos v. United States, 255 U.S. 313 . . . .	5
Brown v. Illinois, 422 U.S. 590 . . . . .	4
Channel v. United States, 285 F.2d 217 . . .	5
Escobedo v. Illinois, 378 U.S. 478 . . . . .	4
Gouled v. United States, 255 U.S. 298 . . . .	5
Green v. United States, 355 U.S. 184 . . . .	5
Holloway v. Wolff, 482 F.2d 110, 115 (8th Cir. 1973) . . . . .	5
Johnson v. Zerbst, 304 U.S. 458 . . . . .	5
Ker v. California, 374 U.S. 23 . . . . .	5
Martin v. United States, 99 F.2d 236 . . . .	5



## Contents

	Page
Miranda v. Arizona, 384 U.S. 436 . . . . .	4
People v. Loria, 10 N.Y. 2d 368 . . . . .	5
Schneckloth v. Bustamonte, 412 U.S. 218 . .	4
United States v. Hearn, 496 F.2d 236, 241- 244 (6th Cir.) cert. den. 419 U.S. 1048 (1974) . . . . .	5
United States v. Selafani, 265 F.2d 408 . . .	5
United States v. Watson, 44 U.S.L.W. 4112, 4116 . . . . .	4

In The  
UNITED STATES COURT OF APPEALS  
For the Second Circuit

- - - - -x

UNITED STATES OF AMERICA,  
Appellant,

-against-

75-1376

DOMINIC TORTORELLO,  
Defendant-Appellee.

- - - - -x

PETITION FOR REHEARING AND PETITION FOR REHEARING  
EN BANC, BY DOMINIC TORTORELLO, AND MOTION IN THE  
ALTERNATIVE FOR A STAY OF MANDATE PENDING CERTIORARI

TO THE HONORABLE JUDGES HAYS, MULLIGAN, AND GURFEIN:

HONORABLE SIRS:

Dominic Tortorello, the appellee herein, respectfully presents this petition wherein he is seeking a rehearing and reconsideration of this Court's decision and opinion rendered the 1st day of April, 1976, which unanimously reversed the order of Honorable Lloyd R. MacMahon, United States District Judge for the Southern District of New York, which had suppressed evidence consisting of stolen coffee and certain statements of Dominic Tortorello, for use as evidence against him at trial, on the grounds that such evidence was the product of an illegal search.



In the event that this panel does not grant the requested relief or, after granting it, adheres to its present determination, then and in that event, the appellee respectfully requests that this petition be circulated among all of the judges of the circuit to determine whether or not the required relief should be granted en banc.

#### REASONS FOR GRANTING THE PETITION

1. Copies of the briefs filed in the Court below by the appellee will be filed with this petition for rehearing.

The Court also has the benefit of the appendix filed previously by the Government, and its briefs.

In view of these facts, we submit that it is not necessary to go into an elaborate discussion of the facts, but instead, we incorporate by reference the brief which we submitted upon the original argument.

2. The case below turned upon a question of whether or not Tortorello had "standing" to move to suppress the evidence which was ultimately found by the F.B.I. agents in the basement of a home occupied by his parents, sister, and brother-in-law.

The agents had come to this home looking for stolen coffee, some of which they had improperly found in a garage. The coffee which was in the garage was not the predicate of the charges

against Tortorello and this Court, therefore, found that it was only the coffee boxes located in the basement which were the subject matter of the prosecution and the suppression motion (Slip Op., 2886, 2887).

3. This panel decided that Judge MacMahon in the Court below was incorrect in his ruling that the evidence should be suppressed, that is the 250 boxes of coffee found in the basement of the said house.

4. It does not appear that this Court was concerned with the fact that the Government had originally conceded that Tortorello had standing to move to suppress, since it found that Tortorello had given a valid "consent" to the search.

5. We find it difficult to follow the reasoning of this Court's opinion and submit that it should be reconsidered because it is paradoxical and contradictory.

If, as this Court has found, Tortorello lacked "standing" to even object to a search, how could he, under any circumstances, give a valid consent to permit the search?

We must bear in mind, of course, that the evidence involved will be used only against Tortorello upon any trial that may eventuate. Yet Tortorello is deemed to have no standing whatsoever, but, nonetheless, is concluded by his "voluntary consent." Can this Court find that a stranger is authorized



to give consent to search a premises over which he has no proprietary interest? This Court necessarily found some interest.

6. This Court notes (Slip Op. 2888) that Tortorello contended that he was coerced to agree, but apparently is satisfied that his consent was voluntary.

We submit that a rehearing and reconsideration with respect to this aspect is warranted since it is difficult to perceive on what basis this Court found a voluntary consent. The circumstances under which the consent was obtained fly in the face of any conception of voluntariness.

We must bear in mind that Tortorello was in custody of the F.B.I. and had been summarily "ordered" to his parents' home without the benefit of counsel, although the F.B.I. had reason to know that he had previously been arrested by state authorities and in all likelihood had an attorney of record. (See Schneckloth v. Bustamonte, 412 U.S. 218; and Brown v. Illinois, 422 U.S. 590; Miranda v. Arizona, 384 U.S. 436; Escobedo v. Illinois, 378 U.S. 478.)

7. We recognize that the Supreme Court has noted that the fact of custody alone has never been enough in itself to demonstrate a coerced consent to search (United States v. Watson, 44 U.S.L.W. 4112, 4116), but, nevertheless, there are



cases consistently holding that consent pursuant to a "response to lawful authority" can never be deemed voluntary. (United States v. Sciafani, 265 F.2d 408; Gouled v. United States, 255 U.S. 298; Channel v. United States, 285 F.2d 217; People v. Loria, 10 N.Y.2d 368. See also, Amos v. United States, 255 U.S. 313, and other cases.)

8. It must also be borne in mind that the presumption is against a waiver of one's constitutional rights (Johnson v. Zerbst, 304 U.S. 458; Green v. United States, 355 U.S. 184; and Martin v. United States, 99 F.2d 236).

9. In addition, there are high standards of proof required in a federal hearing to determine if a defendant, who was in custody, gave his consent to a search (Ker v. California, 374 U.S. 23).

10. We are also baffled by this Court's reasoning that despite the fact that the search of the garage was an unreasonable search which ordinarily would have tainted any consent, that Tortorello cannot gain the benefit of this because his own right of privacy had not been invaded. (See United States v. Hear, 496 F.2d 236, 241-244 (6th Cir.), cert. den. 419 U.S. 1048 (1974); and Holloway v. Wolff, 482 F.2d 110, 115 (8 Cir., 1973)).

Tortorello, on the one hand, is deemed capable of giving a consent to search premises over which he supposedly has no proprietary interest, but, on the other hand, is not permitted to take advantage of a palpably improper basis for seeking that consent, i.e., the warrantless search of the garage.\*

11. The use of Tortorello as a person from whom consent was sought, was absurd if, on the one hand he is deemed to have no proprietary interest in the premises and, therefore incapable of consenting to anything but, on the other hand, is held bound by his meaningless gesture of consenting. Could Tortorello consent to a search of this courthouse because he is in it?

Since the co-defendant is clearly entitled to benefit by a suppression of evidence, it is incredible that Tortorello should not be similarly treated. If Tortorello's consent was valid, it was valid for everyone in those premises. If there was an unlawful search of the garage, then no consent of anyone deemed capable of consenting would be effective.

The reasoning in this case is so contradictory that we submit a rehearing is warranted.

---

\* Clearly, all agreed below that Tortorello was in custody and that the unwarranted garage search precipitated the basement search.



12. We find it somewhat ironic that the prosecutor's "consent" and "concession" that Tortorello had standing, is not deemed binding although voluntarily given. We are also somewhat nonplussed by the fact that the prosecutor is not held bound by his voluntary waiver of the right to appeal.

In other words, "What is sauce for the goose is not sauce for the gander" in this case.

A rehearing should be granted.

**MOTION IN THE ALTERNATIVE FOR A  
STAY OF MANDATE PENDING CERTIORARI**

In the event this Court, either through this panel or en banc, does not ultimately grant the relief requested, we ask that the mandate be stayed pending a petition for certiorari to the Supreme Court of the United States.

We submit that the ruling of this Court, in essence, renders the question of "standing" difficult to understand and creates a great deal of confusion on the meaning of "consent" to search.

In addition, it is submitted that on the traditional questions of voluntariness, there should not have been a finding of consent.

Finally, whether the prosecutor can waive the right of appeal and retract a concession of standing, is also presented.

Respectfully submitted,

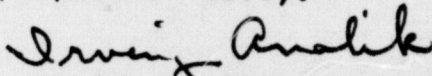
IRVING ANOLIK, Of Counsel to  
JOSEPH P. CARROZZA,  
Attorney for Appellee  
225 Broadway  
New York, N.Y. 10007  
(212) 732-3050

IRVING ANOLIK,  
Of Counsel

-----

CERTIFICATION

I hereby certify that this petition for rehearing is submitted in good faith and not for the purpose of delay.

  
s/ Irving Anolik  
IRVING ANOLIK



UNITED STATES COURT OF APPEALS  
FOR THE SECOND CO CIRCUIT

UNITED STATES OD OF AMERICA,  
Appellant,

- against -  
DOMINIC TORTORELLO,  
Defendant- Appellee.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK

ss.:

I, Victor Ortega, being duly sworn,  
depose and say that deponent is not a party to the action, is over 18 years of age and resides at  
1027 Avenue St. John, Bronx, New York

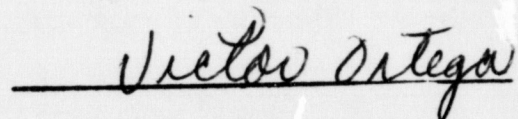
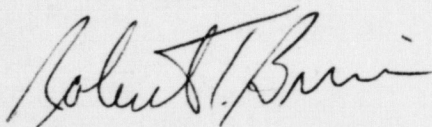
That on the 3<sup>th</sup> day of April 1976 at 225 One St. Andrews Plaza, New York

deponent served the annexed Petition for Rehearing upon

Robert B. Fiske Jr.

the Attorney in this action by delivering a true copy thereof to said individual  
personally. Deponent knew the person so served to be the person mentioned and described in said  
papers as the herein,

Sworn to before me, this 13<sup>th</sup>  
day of April 1976



VICTOR ORTEGA

ROBERT T. BRIN  
NOTARY PUBLIC, State of New York  
No. 31-0418950  
Qualified in New York County  
Commission Expires March 30, 1977